No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

JESUS E. CORTEZ and PEDRO HERNANDEZ-LOERA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-16a) is reported at 595 F.2d 505.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1979. A timely petition for rehearing

was denied on July 19, 1979 (App. B, *infra*, 17a-18a). On August 9, 1979, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a founded suspicion of criminal activity can be based on circumstantial evidence suggesting that a particular person or vehicle is involved in criminal activity or must be based on direct observation of inherently suspicious activity.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

STATEMENT

Following jury trials in the United States District Court for the District of Arizona, respondents were convicted of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2). Each respondent was sentenced to concurrent terms of five years' imprisonment on each of six counts. In addition, respondent Hernandez-Loera was fined $12,000.

1. The evidence at a pretrial suppression hearing showed that in early December 1976, Border Patrol officers patrolling a sparsely populated area of the Mexican border near Sells, Arizona, began investigating footprints indicating that on a number of occasions groups of from eight to 20 persons had walked north from the border across 30 miles of desert and mountains to an isolated area on Highway 86, an east-west highway in Arizona (S. Tr. 11-28, 56-70).[1] The officers found that the footprints followed a fairly well-defined path and that the groups travelled without resting (S. Tr. 17, 32). They noticed in particular that one recurring shoeprint was of a distinctive "chevron" design (S. Tr. 12-13, 56-57). The officers knew that the area through which the groups passed was heavily used by aliens illegally entering the country (S. Tr. 23), and they concluded that a person (whom they referred to as "Chevron") was guiding groups of aliens across the border and north to a place on Highway 86 (between mileposts 114 and 122) where they would be picked up by a vehicle (S. Tr. 68).

Analysis of the footprints and the times of their recurrence led the officers to a number of additional conclusions. First, they decided that the groups travelled at night, because the prints led into or over obstacles that would have been avoided in daylight (S. Tr. 15, 61). They also found that the tracks were made during clear weather and on or near week-

[1] "S. Tr." refers to the transcript of the suppression hearing.

ends (S. Tr. 54, 65-66, 73-74). In addition, the tracks around Highway 86 indicated that the aliens, when they reached the highway, would walk parallel to it for several miles in an eastward direction; typically, the tracks proceeded eastward some 50 to 75 yards away from the highway and then turned directly north to the highway and disappeared (S. Tr. 19-20, 41-42). From this the officers concluded that the groups had been picked up by a vehicle that probably approached them from the east, because it was unlikely that the aliens, after a long overland march, would walk along the highway away from the vehicle that was coming to meet them and be facing a direction from which they could not easily identify the oncoming pick-up vehicle. The officers also concluded that, after meeting the groups, the pick-up vehicle probably returned to the east, because it was unlikely that the aliens would be walking away from their ultimate destination (S. Tr. 68-69, 104-105).

On the evening of January 30, 1977, two officers who had been involved in the investigation of the chevron tracks decided to station themselves just off Highway 86 at a point approximately 30 miles east of the area where the Chevron-led groups had been picked up and to watch for a vehicle that might be used in the operation. The officers selected that night as a likely time for Chevron to lead another group to the highway because it was Sunday and the first clear night after a three-day period of rain

(S. Tr. 70, 147).[2] The officers assumed that if Chevron did decide to lead a group that night, he would not begin until after 6:00 p.m., when it got dark. Assuming that the group would cover between two and a half and three miles an hour travelling on foot, the officers calculated that it would take the group between eight and 12 hours to reach their pick-up point on Highway 86—*i.e.*, that they would be picked up between 2:00 and 6:00 a.m. on January 31 (S. Tr. 18, 73).

The officers decided to watch particularly for a camper, van, or similar vehicle that was capable of concealing a fairly large group and that passed them in a westward direction and returned eastward approximately one and a half hours later (S. Tr. 74). In their experience those were the types of vehicles most commonly used for smuggling sizeable groups of aliens,[3] and they calculated that it would take the pick-up vehicle an hour and a half after it passed them to drive to the estimated pick-up point and return (S. Tr. 74-76).

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[2] Tracks that had included the chevron print had been found and followed on two previous occasions that month, on January 4 and on January 16 (S. Tr. 58-69).

[3] The two officers involved had substantial border patrol experience. Each had been a Border Patrol officer working in this area for two and a half to three years, and both had substantial previous law enforcement experience (S. Tr. 55-56, 131-132). In addition, another officer who had participated in the investigation of the chevron tracks had been a Border Patrol officer for eight years and had considerable expertise in tracking (S. Tr. 3, 25).

During the early morning hours of January 31 the officers saw 15 to 20 vehicles pass them in a westward direction; only two of them—both pick-up trucks with camper shells—were of the kind that the agents considered likely to be used for smuggling (S. Tr. 76-77).[4] The first camper passed them at 4:30 a.m.[5] At 6:12 a.m. this vehicle passed them again in an eastward direction (S. Tr. 80). The officers followed the camper and confirmed from its license plate that it was the vehicle that had passed them going west at 4:30 a.m. (S. Tr. 81). They then turned on their emergency lights and pulled it over (*ibid.*). When the camper pulled over, respondent Cortez got out. As he approached the officers, one of them noticed the curtain on the rear window of the camper move. The officers identified themselves and told Cortez they were conducting an immigration check. They asked Cortez if there was anyone in the camper. Cortez stated that he had picked up some hitchhikers, and he proceeded to open the back of the camper (S. Tr. 82-84). After the officers established that the six persons in the back of the camper were aliens, the officers placed Cortez under arrest. The officers also arrested respondent Hernandez-Loera, who was sitting on the passenger

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[4] During the same period, the officers estimated that six to 10 vehicles passed them travelling in an eastward direction (S. Tr. 80).

[5] The second camper passed them 15 to 20 minutes later and did not, as far as the record shows, return (S. Tr. 78).

side of the camper. His shoes bore the distinctive chevron design on their soles (S. Tr. 85).

2. The district court denied the motion to suppress (S. Tr. 166). The court of appeals reversed, holding that the officers lacked reasonable suspicion justifying the stop of the camper (App. A, *infra*, 1a-8a).[6] The court explained its reasons as follows (*id.* at 6a-8a; emphasis in original):

> The founded suspicion test plainly requires balancing of the facts of the particular case, see [*United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975)], and in such circumstances we will not find absolutely controlling precedent since the facts will differ. A case from our court which is quite closely related is *United States* v. *Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975).
>
> In that case, officers routinely stopped southbound vehicles in a "profile" class of automobile models thought likely to be stolen and transported from Phoenix or Tucson into Mexico. The "*profile*" was, we may say, constructed from specific, articulable facts. Nevertheless, we said: "Founded suspicion requires some reasonable ground *for singling out the person* stopped as one who was involved . . . in criminal activity" (emphasis added) (523 F.2d at 241). We pointed

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[6] Respondents' only claim on appeal was that the officers lacked reasonable suspicion justifying the initial stop. They did not contend that the subsequent discovery of the aliens and the arrest of respondents was unlawful even if the stop had been proper. Such a contention would be insubstantial in any event in view of the fact that respondent Cortez voluntarily opened the door to the camper, claiming that the occupants were hitchhikers (S. Tr. 82-84).

> out that Carrizoza-Gaxiola, himself, was doing nothing suspicious. Here, too, the stop was solely a product of a profile, not of facts associated with the individual, his behavior, or the specific appearance of his vehicle.
>
> The founded suspicion test must be read as requiring some additional fact or facts which focus suspicion on the individual or vehicle stopped. * * *
>
> The officers did not have a valid basis for singling out the Cortez vehicle. They saw no one in the camper. They saw nothing suspicious about the vehicle itself. They had no specific information about illegal movement of aliens in that area that night. They observed no mechanical or equipment defects in connection with the vehicle. They observed no violation of traffic laws as in *United States* v. *Finnegan*, 568 F.2d 637 (9th Cir. 1977). The sole suspicious fact connected with this specific vehicle was that it passed the officers' post headed west and returned headed east, both times in the pre-dawn hours. The passage of nearly two hours' time and the fact that the vehicle could have traveled to a small town and returned within that time, both furnish far too many innocent inferences to make the officers' suspicions reasonably warranted.

Judge Chambers dissented (App. A, *infra*, 8a-16a). After fully reviewing the facts, he concluded (*id.* at 15a-16a):

> *United States* v. *Brignoni-Ponce*, supra, recognizes the validity of permitting an officer "to assess the facts in light of his experience in de-

> tecting illegal entry and smuggling". In this case the officers, on the basis of their experience, put together a series of clues and concluded that there was a strong possibility that Chevron would bring a group of aliens across the border on this night and hour and place, and that he would be met by a vehicle of this sort, traveling in this direction. The clues, as they analyzed them, were absolutely correct in each detail. I fail to see that suspicion, based on this sort of skillful police analysis, can be called "unfounded" within the test of *Brignoni-Ponce*. I therefore dissent.

REASONS FOR GRANTING THE PETITION

We submit that the court of appeals in this case seriously erred in concluding that the Border Patrol officers lacked reasonable and articulable suspicion justifying the investigatory stop of respondent Cortez' vehicle, and that its conclusion was based on a legal standard in conflict with the standards established in *Terry* v. *Ohio*, 392 U.S. 1 (1968), *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), and other decisions of this Court.

We also believe that the court of appeals' decision has important implications for the operations of the Border Patrol and other law enforcement agencies and therefore warrants the Court's review. A large part of the duties of the Border Patrol and other federal agencies responsible for enforcing the immigration and customs laws of the United States are performed in the Ninth Circuit, and those agencies must

necessarily strive to conform their law enforcement methods and practices in that jurisdiction to the decisions of that court. In this case, officers of the Border Patrol undertook an investigation that, in our view, should be considered a model of good police work and of scrupulous compliance with the dictates of the Fourth Amendment: namely, a careful and thorough gathering of information over an extended period of time and a skillful analysis of that information in light of the officers' substantial experience, all of which led them eventually to select one vehicle (out of more than 20 that passed them during their surveillance) for a brief investigatory stop that proved the correctness of their information and conclusions. The court of appeals has now held that the officers' actions and inferences were unreasonable and that officers in those circumstances may not make a brief investigatory stop of a suspected vehicle unless they observe some particular feature of the vehicle or its occupants that indicates criminal activity in and of itself and without regard to other circumstances focusing the officers' suspicion on the vehicle. The consequence of that decision may be significantly to impair effective (and we believe proper) law enforcement actions and to discourage the kind of careful preparatory police work reflected in this case.

1. In *Terry* v. *Ohio* and subsequent cases, this Court has established that police officers may briefly stop a vehicle or detain a person for investigative purposes if they can point to specific facts that are reasonably indicative of possible criminal activity but

that do not amount to probable cause—*i.e.*, facts that support a reasonable suspicion, but not necessarily a reasonable conclusion, of criminality. See *Terry, supra*, 392 U.S. at 20-27; *Adams* v. *Williams*, 407 U.S. 143, 146-149 (1972); *United States* v. *Brignoni-Ponce, supra*, 422 U.S. at 880-882. The proper consideration, as the Court stated in *Terry*, is whether an officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" (392 U.S. at 21; footnote omitted).

In *United States* v. *Brignoni-Ponce, supra*, this Court applied those principles specifically in the context of vehicle stops by Border Patrol officers. Although the Court concluded that the single factor relied on by the agents in that case—the apparent Mexican ancestry of the occupants—did not furnish reasonable grounds justifying the intrusion, it made clear that other circumstances may furnish reasonable suspicion justifying what the Court recognized (422 U.S. at 880) to be a modest intrusion on the privacy interests of travellers. Thus, the Court stated (422 U.S. at 884-885):

> Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area. Officers may consider the characteristics of the area in which they encounter a vehicle. Its proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic are all relevant. * * *

> They also may consider information about recent illegal border crossings in the area. The driver's behavior may be relevant * * *. Aspects of the vehicle itself may justify suspicion. For instance, officers say that certain station wagons * * * are frequently used for transporting concealed aliens. * * * In all situations the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling.

Under that standard the stop in this case was, we submit, plainly permissible. The officers took into account almost all of the factors identified by the Court in *Brignoni-Ponce* as relevant—the characteristics of the area as sparsely populated and commonly used by aliens entering the country, its close proximity to the border, and the aspects of the vehicle as one capable of concealing a sizeable group of persons and one commonly used for smuggling aliens. Of particular significance, they also relied on "information about recent illegal border crossings in the area," and indeed in this case they were able to deduce from that information a likely and very specific modus operandi in terms of weather conditions, the time of day, the time of the week, and the particular movements of the suspected pick-up vehicle. In sum, it is difficult to imagine a more complete and sufficient set of "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant[ed] [the] intrusion." *Terry* v. *Ohio*, *supra*, 392 U.S. at 21 (footnote omitted).

2. Notwithstanding all those specific and articulable facts, the court of appeals concluded that there

was not a reasonable basis for the stop because the officers lacked a certain kind of additional information—namely, their direct observation of some aspect of the vehicle or its occupants that in and of itself indicated criminal activity, such as, the court suggested (App. A, *infra*, 7a), mechanical or equipment defects or a violation of the traffic laws.[7] The court's decision thus appears to stand for the legal proposition that founded suspicion can never be established on the basis of what is commonly referred to as circumstantial evidence.

That proposition of law finds no support in this Court's decisions, and it conflicts squarely with the standards that *Brignoni-Ponce* established specifically with respect to the Border Patrol. Moreover, that proposition would not provide a workable standard because there is no meaningful distinction, at least in this context, between the kinds of evidence that can establish reasonable suspicion.

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[7] The court also noted (App. A, *infra*, 7a) that the officers "had no specific information about illegal movement of aliens in the area that night." Although we submit that such "specific information" is not a necessary ingredient for reasonable suspicion, it is difficult to see how such information would have aided the officers under the court of appeals' own view, since it would not have constituted "some additional fact or facts which focus suspicion on the individual or vehicle stopped" (*ibid.*) and would not have provided further grounds for "singling out the Cortez vehicle" (*ibid.*).

The standard suggested by the court of appeals conflicts with *Brignoni-Ponce* because it would make most of the factors identified as relevant by this Court—the characteristics of the area, its proximity to the border, usual traffic patterns, previous experience with alien traffic, recent border crossings, and the type of vehicle stopped—either irrelevant or superfluous. Unless there is some additional and specific aspect of the vehicle that is directly observed and that itself suffices to create a reasonable suspicion of criminal activity, no combination of those other factors apparently can furnish reasonable suspicion satisfying the court of appeals, no matter how compellingly they indicate to a man of reasonable caution that a limited stop for further investigation is warranted. Yet *Brignoni-Ponce* clearly established that all of the factors identified by the Court are relevant; the fact that the Court stated that each of those factors "may" be considered (422 U.S. at 885) further indicates that no single one of those factors must be present in every case.

Furthermore, the standard suggested by the court of appeals is unworkable. *Terry*, *Brignoni-Ponce*, *Adams* v. *Williams* and many other decisions make clear that whether an investigatory stop is based on reasonable suspicion depends on the totality of the information known to the officer, and indeed it could hardly be otherwise. The materiality of any single item of information necessarily depends on all of the information known to the officer, and the court of appeals' distinction between directly ob-

served evidence suggesting criminal activity—which it believes must be present to furnish reasonable suspicion—and circumstantial evidence suggesting criminal activity is a meaningless distinction in this context. Almost any observed characteristic of a vehicle or a person, which may seem entirely innocent in itself, may, on the basis of the totality of the known circumstances, be quite indicative of criminal activity to a person of reasonable caution. Conversely, almost any observed characteristic that might be quite suspicious in some, or even most, contexts, might actually be indicative of innocence in light of all of the circumstances known to an officer. In short, there would ordinarily be no meaningful way by which an officer could conclude that a given set of directly observed characteristics of a vehicle or its occupants does or does not indicate criminal activity unless he considers the total context and all other circumstances known to him.[8]

In sum, the court of appeals' decision imposes an unworkable and unsound standard on law enforce-

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[8] Cases and treatises on the law of evidence often refer to a distinction between direct and circumstantial evidence; circumstantial evidence is generally defined as evidence from which an inference must be drawn to arrive at the proposition asserted, and direct evidence is evidence from which no inference need be drawn. The distinction, however, is only descriptive, and the competency or admissibility of evidence does not turn upon it. Some authorities have recognized that the distinction is not entirely meaningful, since all evidence requires the factfinder to draw at least some inference (*e.g.*, that the eyewitness was not hallucinating). See I J. Wigmore, *Evidence* §§ 25, 26 (3d ed. (1940); *United States* v. *Becker*, 62 F.2d 1007, 1010 (2d Cir. 1933) (L. Hand, J.).

ment agencies operating within its jurisdiction, a standard that would encourage officers to focus on specific kinds of observations that may not be particularly probative in the circumstances and would deter them from making rational decisions on the basis of thorough background investigations.

3. The court of appeals expressed the view (App. A, *infra*, 6a) that all reasonable suspicion cases, including this one, turn on their particular facts, and for that reason the decision below might be viewed as simply the erroneous application of correct legal principles to a particular set of facts, which would not ordinarily warrant this Court's review. We believe that view would be incorrect and that the court's opinion clearly indicates that it is based on a standard of law that, as we have discussed, is erroneous.

It is not entirely clear, however, whether the legal principles stated and applied in the decision below reflect the settled law of the Ninth Circuit. Several Ninth Circuit decisions have upheld investigative stops of vehicles on the basis of the same kind of circumstantial evidence known to the officers in this case.[9] On the other hand, in *United States* v. *Carrizoza-Gaxiola*, 523 F.2d 239, 241 (9th Cir. 1975), on

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[9] See *United States* v. *Bates*, 533 F.2d 466, 469 (9th Cir. 1976); *United States* v. *Nunez-Villalobos*, 500 F.2d 1023 (9th Cir. 1974).

To our knowledge, no other court of appeals has suggested that reasonable suspicion may not be based on circumstantial evidence, and we have found no other cases which have drawn a distinction between directly observed and circumstantial evidence in this context. For that reason, and because that distinction (as we have argued) is not

which the court below relied (App. A, *infra*, 6a), the court purportedly applied the legal standard endorsed in the opinion below, although the facts of that case were quite different.[10] Furthermore, in this case our

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a meaningful one, it is difficult to point to any clear conflict among the circuits on this point, except the negative fact that no other circuit has suggested the standard reflected in the decision below.

[10] As Judge Chambers pointed out in his dissent below (App. A, *infra*, 14a), the stop in *Carrizoza-Gaxiola* was based solely on the fact that the defendant was driving a particular kind of automobile, many of which had been stolen.

In *Carrizoza-Gaxiola*, the court referred to the stop as having been based solely on a "profile" of cars that had been stolen, and in this case the court also referred to the stop as being "solely a product of a profile, not of facts associated with the individual, his behavior, or the specific appearance of his vehicle." App. A, *infra*, 7a. A large number of decisions have concerned the use by law enforcement agencies of "profiles". A profile, as the term is most commonly used, is a set of typical characteristics of a particular type of criminal developed by agents on the basis of their experience, and it is used as part of the basis for stopping a person matching the profile, quite apart from the agents' possession of specific information that the person is engaged in criminal activity. Perhaps the most commonly litigated profiles are ones that have been developed by agents of the Drug Enforcement Administration in connection with a nationwide airport surveillance program designed to detect drug carriers. The courts of appeals are divided on whether reliance on that profile is proper, and that is one of the issues presented in our petition for a writ of certiorari in *United States* v. *Mendenhall*, No. 78-1821 (filed June 5, 1979).

The information relied on by the officers in this case is not a profile as the term is commonly used, because the information was developed in connection with a very specific set of facts and related directly to the criminal activity that was ultimately detected. Nevertheless, the rationale of the court of appeals for rejecting the officers' reliance on this informa-

petition for rehearing en banc was denied (App. B, *infra*, 17a-18a). It thus appears that the decision below does reflect the law of the Ninth Circuit, and the significant implications of the legal question presented, both generally and in the particular context of border policing activities, warrant this Court's review.[11]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1979

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tion—the absence of direct evidence of the particular defendant's criminal activity—is similar to the rationale of those courts that have disapproved reliance on profiles like the DEA profiles, and the issue in this case is analytically similar to the issue presented in *Mendenhall* (see 78-1821 Pet. 16-18 & n.16).

[11] If the Court agrees with our submission that the court of appeals' conclusion is patently incorrect, it may wish to consider summary reversal.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed April 19, 1979]

No. 77-1987

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JESUS E. CORTEZ, a/k/a JESUS E. CORTEZ-ESPIONZA,
DEFENDANT-APPELLANT

No. 77-1951

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

PEDRO HERNANDEZ-LOERA, DEFENDANT-APPELLANT

OPINION

Appeal from the United States District Court
for the District of Arizona

Before: CHAMBERS and HUG, Circuit Judges, and
FERGUSON *, District Judge

HUG, Circuit Judge:

Jesus E. Cortez-Espinoz (Cortez) and Pedro Hernandez-Loera (Hernandez) appeal from convictions

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* Honorable Warren J. Ferguson, United States District Judge for the Central District of California, sitting by designation.

for knowing transportation of illegal aliens, 8 U.S.C. § 1324(a)(2), contending that the evidence used against them was the product of an illegal vehicle stop by border patrol officers and should have been suppressed. We agree and therefore reverse.

In late December, 1976, border patrol officers found, in the southern Arizona desert, human tracks suggesting that a man, wearing shoes bearing a distinctive "chevron" sole pattern, was engaged in the practice of leading aliens illegally into the United States. The officers inferred from a study of the tracks that "Chevron", as they called him, led groups of from about eight to twenty aliens across the United States-Mexican border at night, on a journey of approximately twenty-five miles on foot to a point on Highway 86 near Sells, Arizona. Highway 86 runs generally east and west between Ajo, Arizona and Tucson. The tracks stopped at the highway and did not reappear anywhere nearby, which suggested to the officers that a vehicle had picked up the aliens. The officers' studies further indicated that Chevron led his groups into Arizona on Friday, Saturday, Sunday or Monday nights, but whether he led groups every weekend they did not know. No one had actually seen Chevron or one of his groups in transit. The latest set of tracks located before the night of the instant arrest was made on the night of Saturday, January 15-16, 1977.

On the Sunday night of January 30-31, 1977, officers Gray and Evans of the border patrol were on duty in the general area. They "felt" that Chevron

would lead a new group that night. It was a hunch, because they had no reason to believe that Chevron operated every weekend, and there was no reason why the expedition could not have occurred on the following night.

The officers did not set up an observation point in the vicinity of the chevron tracks but instead, at about 1:00 A.M. Gray and Evans parked their patrol car about one hundred feet off the highway at a point some twenty-seven miles to the east of the place where the chevron tracks had disappeared in the past. They selected this location because they were primarily responsible for watching the Altar Valley area, where a small road joined the highway, but they believed they could also watch for Chevron's vehicle there.

Gray and Evans decided that in watching for Chevron's vehicle, they would limit their attention to certain kinds of vehicles, and within that class of vehicles, only to those vehicles which passed them travelling westward and returned approximately ninety minutes later, travelling eastward. The class included vans, campers and pickup trucks that could easily hide eight to twenty aliens without drawing attention from any law enforcement authority. The class did not include commercial-looking trucks, nor did it include station wagons or sedans, although the officers knew of the practice of secreting as many as eight aliens in the trunks or rear compartments of these vehicles.

The officers also admitted that they had no reason to know that the vehicle assisting Chevron would approach from, and return to, the east rather than the west. They did not explain why such a vehicle could not approach the pick-up point from one direction and then continue in the same direction. They admitted that if Chevron had led a group across the border before dark that afternoon, he and his group could have been picked up and transported eastward, past the Gray-Evans checkpoint, before the two officers parked there at 1:00 A.M. They admitted that a vehicle could have passed them, gone to Sells, a town west of the chevron tracks, for legitimate purposes and returned within the ninety-minute time frame they established.

Gray and Evans saw two vehicles in this "profile" class, both campers, travelling westward that night. Shortly after 6:00 A.M., one of the two returned, heading east. As the vehicle went by, the officers did not see anyone in the camper, and on neither occasion was the driver speeding or otherwise behaving suspiciously. The officers turned on their flashing red lights and stopped the camper. The officers stated that they would have searched every single vehicle fitting the profile as it returned from the west.

Appellant Cortez was the driver and owner of the camper. When the truck was stopped, appellant Hernandez, wearing the "chevron" shoes, was sitting in the passenger's seat. In the rear compartment of the camper were six aliens who had illegally entered the United States with Hernandez earlier in the evening.

The issue is whether under the Fourth Amendment adequate cause existed to justify the stop of the camper. The courts have recognized that brief, investigatory stops under circumstances not constituting probable cause for arrest or search are permissible for effective law enforcement. *United States* v. *Avalos-Ochoa*, 557 F.2d 1299, 1301 (9th Cir. 1977).

The quantum of cause necessary in such cases was established by the Supreme Court in *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975). "[O]fficers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country". 422 U.S. at 884.

This lesser standard is justified on the theory that the Fourth Amendment must apply to a "stop", as well as to an arrest or seizure; however, because the intrusion upon privacy is not as great, the range of unreasonable police behavior is correspondingly less broad. *United States* v. *Brignoni-Ponce*, 422 U.S. at 779-81; *see also Terry* v. *Ohio*, 392 U.S. 1 (1968).

The *Brignoni-Ponce* test has often been referred to, in more general terms, as the "founded suspicion" test. *See United States* v. *Avalos-Ochoa*, 557 F.2d at 1301; *United States* v. *Rocha-Lopez*, 527 F.2d 476 (9th Cir.), *cert. denied*, 425 U.S. 977 (1976). We will use that term. We must determine whether founded suspicion existed at the time the officers

turned on the flashing red lights atop their vehicle; nothing that happened afterward can be relied upon to justify the stop. *United States* v. *Morrison*, 546 F.2d 319 (9th Cir. 1976); *United States* v. *Avalos-Ochoa*, 557 F.2d 1299.

Finally, we note that the ultimate question on appeal is whether the trial judge's finding that founded suspicion was present here was clearly erroneous. *United States* v. *Patterson*, 492 F.2d 995 (9th Cir.), *cert. denied*, 419 U.S. 846 (1974); *United States* v. *Thompson*, 558 F.2d 522 (9th Cir. 1977); *United States* v. *Page*, 302 F.2d 81, 85 (9th Cir. 1962) (*en banc*).

The founded suspicion test plainly requires balancing of the facts of the particular case, see *Brignoni-Ponce*, 422 U.S. at 884-85, and in such circumstances we will not find absolutely controlling precedent since the facts will differ. A case from our court which is quite closely related is *United States* v. *Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975).

In that case, officers routinely stopped southbound vehicles in a "profile" class of automobile models thought likely to be stolen and transported from Phoenix or Tucson into Mexico. The "*profile*" was, we may say, constructed from specific, articulable facts. Nevertheless, we said: "Founded suspicion requires some reasonable ground *for singling out the person stopped* as one who was involved . . . in criminal activity" (emphasis added) (523 F.2d at 241). We pointed out that Carrizoza-Gaxiola, himself, was

doing nothing suspicious. Here, too, the stop was solely a product of a profile, not of facts associated with the individual, his behavior, or the specific appearance of his vehicle.

The founded suspicion test must be read as requiring some additional fact or facts which focus suspicion on the individual or vehicle stopped. As Mr. Justice Harlan said, discussing the *Terry* standard in his concurring opinion in *Sibron* v. *New York*, 392 U.S. 40, 73 (1968), "[T]here must be something at least in the activities *of the person* being observed or in his surroundings that affirmatively suggests *particular* criminal activity . . .". (emphasis added) It is not enough that the officer has a hunch that criminal activity is afoot. *United States* v. *Torres-Urena*, 513 F.2d 540 (9th Cir. 1975).

The officers did not have a valid basis for singling out the Cortez vehicle. They saw no one in the camper. They saw nothing suspicious about the vehicle itself. They had no specific information about illegal movement of aliens in the area that night. They observed no mechanical or equipment defects in connection with the vehicle. They observed no violation of the traffic laws as in *United States* v. *Finnegan*, 568 F.2d 637 (9th Cir. 1977). The sole suspicious fact connected with this specific vehicle was that it passed the officers' post headed west and returned headed east, both times in the pre-dawn hours. The passage of nearly two hours' time and the fact that the vehicle could have traveled to a small town and

returned within that time, both furnish far too many innocent inferences to make the officers' suspicions reasonably warranted. *See United States* v. *Ogilvie*, 527 F.2d 330 (9th Cir. 1975) (turning off highway and turning around).

Each appellant raises a second issue. Cortez complains of a jury instruction and Hernandez claims that his sentencing process was defective. Because of our resolution of the issue jointly raised, there is no need for us to reach these two claims.

The stop of Cortez' vehicle was a violation of the appellants' rights under the Fourth Amendment. The evidence adduced at trial was a direct product of the constitutional violation and should have been suppressed.

The convictions are reversed.

CHAMBERS, Circuit Judge, dissenting:

I find no error, much less clear error, in the district judge's conclusion that there was founded suspicion to stop this vehicle. He listened to the witnesses, obviously credited the officers' testimony, and then ruled that they acted on founded suspicion. This Court rarely interferes in a trial judge's findings as to witness credibility. In any event, I find no suggestion that the majority wish to interfere. I find nothing to indicate that the officers' testimony is not to be believed or that the officers manufactured the evidence which they said led them to suspect and to stop this vehicle. As I read the majority opinion, it is that the information which the officers had be-

fore them, and the reasonable inferences drawn from it, was insufficient as a matter of law to permit them to make this stop. I disagree.

The officers put together a series of suppositions drawn from their specialized experience in investigating alien smuggling along the Arizona border with Mexico. Each of these suppositions proved to be totally founded in fact. But the majority says that it was unfounded in law. The majority says it was a blind hunch. I call it responsible police work.

What were these suppositions? The officers testified that they knew from official reports from their colleagues, and from personal investigation on their own part, that a guide whose shoes bore a distinctive chevron design was leading groups of aliens across the border along a well-defined route. It began near the border town of San Miguel, passed through the Baboquivari Valley, and ended at an area between Mileposts 114 and 122 on Highway 86, less than 30 miles north of the border. Two weeks earlier, one of the officers had personally tracked Chevron along this route for more than 22 miles. Both officers were unquestionably well-trained as trackers. They could tell that Chevron was probably of Latin descent, that he usually led groups of from 8 to 20 aliens, and that they never meandered but proceeded by forced march in a determined manner. From this the officers drew the reasonable conclusion that Chevron was a professional and that the aliens were not mere transients. The officers knew from their experience that professional smugglers in this particular area always

work at night, and Chevron's tracks indicated that he traveled at night. The officers knew that border crossings were preferably made in good weather, when the sky is clear and there is good moonlight. They also knew that Chevron preferred to travel on or near weekends.

The night in question was the first clear night after a rainy three-day period that had included a weekend. The officers' primary responsibility that night was watching the junction of Route 286, running north from Sasabe, with Route 86 at a location called "Three Points". Obviously the officers did not *know* that Chevron would be crossing that night, but both, in their experience, believed that he would attempt it that night. They therefore decided to watch not only the junction with Route 286, but also to keep watch for any vehicle or vehicles that might be used to pick up aliens from the vicinity of Mileposts 114 to 135. Their car was stationed off the road very close to Milepost 149 on Route 86, or about 27 to 35 miles east of the vicinity where Chevron was known to bring his groups.

They computed the distance to be traveled on foot by the aliens and estimated that if Chevron did not cross the border until dark, then the trip could not begin before 6 p.m. On a forced march he would arrive at the pick-up area no earlier than 2 a.m. and no later than 6 a.m. The officers therefore gave special attention to these morning hours. Furthermore, they knew that if Chevron brought a group of between 8 and 20 (which was his pattern), he would

have to be met by a vehicle capable of carrying that number of people. They knew that campers were widely used for this purpose by professional smugglers; they therefore gave close attention to campers traveling on Route 86 during these hours.

The officers were particularly on guard for vehicles traveling in a westward direction on Route 86. They obviously could not be sure that a pick-up vehicle would be traveling in that direction, but they articulated clearly their reasons for believing that this would be the direction that would be followed. On prior trips, after reaching Route 86, Chevron had always led his groups on foot along the side of the road *in an eastward direction.* From this the officers reasonably assumed that the group would be walking *toward* and not away from the pickup vehicle—and *toward* and not away from their ultimate destination. Otherwise, after an arduous, forced nighttime march of over 25 miles, they would be walking *away from* the vehicle that was coming to meet them. And they would be walking with their backs to the approaching vehicle, not facing it in a position to identify the oncoming traffic.

At about 4:30 a.m. the officers saw a yellow-green camper, with a license beginning "GN-88", traveling west on Route 86. About 20 minutes later they saw another camper (license not visible) also traveling west. They were suspicious of both. These were the only vehicles which aroused their suspicion, out of the 12 to 20 westbound vehicles that passed during those morning hours. Others did not meet the profile

that they knew from experience were vehicles used to pick up smuggled aliens. They estimated that it would take about an hour and a half to drive the 27 to 35 miles to the pick up area, find the aliens, load them, and return to Milepost 149. One hour and forty minutes later, at 6:12 a.m., the yellow-green camper reappeared at Milepost 149, now heading east. Faced with the decision of letting it pass, or stopping it to make a brief inquiry, the officers decided to stop it. The majority say they should have let it drive on.

A little must be said of the nature of the terrain in this part of Arizona. We can take judicial notice that the major east-west artery in southern Arizona is Interstate 10 which approaches Tucson from the east and then continues west to Casa Grande where it becomes Interstate 8, and continues west to Gila Bend and Yuma.

Route 86, on the other hand, is a much smaller and less traveled road forming a wide southwesterly arc from Tucson on the east to Gila Bend on the west. Leaving Tucson it heads southwest into the southern portion of the Papgo Reservation and generally parallels the Mexican border. It then joins Route 85 which goes northwest to Ajo and Gila Bend. The testimony is that this is desolate desert terrain, interspersed with mountain ranges. In its less than 100 miles of length it goes through only one area of any population—the Indian village of Sells, which according to the 1970 census had a popluation of 750. The area south of Route 86, between the Baboquivari

and La Lenza Mountains, has less than 100 scattered residents. It was through this area, notorious for alien smuggling, that Chevron was bringing his groups.

The portion of Route 86 between Milepost 149 (where the officers were located) and Mileposts 114 to 122 (where they expected Chevron to arrive) is an unpopulated area. The officers testified that there were only "a couple" of houses along this stretch of road. At least one of the officers obviously knew the local residents; he testified that he had recognized another car as belonging to a local resident.

It is not reasonable to ignore the utter loneliness of the area in question. What might be "unfounded" suspicion in a more populous area of this circuit can be very "founded" suspicion in the barren desert of border Arizona. The round trip of a non-local camper on this stretch of Route 86, between 4:30 and 6:12 a.m., could not help but arouse the suspicion of any well-trained border patrolman. It is clear that officers "may consider the characteristics of the area in which they encounter a vehicle", including its proximity to the border, traffic patterns, "and previous experience with alien traffic." *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-5 (1975). Mere presence near the border in a notorious smuggling area, at 6:40 a.m. when traffic was "light", provided founded suspicion for the stop of a non-local vehicle in *United States* v. *Rocha-Lopez*, 527 F.2d 476 (9th Cir. 1976).

The majority, in my view, fails to take the terrain and the time of day properly into account. Otherwise, they would not be stating that this case "is quite closely related" to *United States* v. *Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975).[1] In that case, officers stopped a Ford LTD being driven by a Mexican-appearing driver, merely because they knew that Ford LTDs were popular among car thieves who sell them in Mexico. The stop was made solely on the "profile" of LTDs being susceptible of car theft. The stop in *Carrizoza-Gaxiola* was made on Interstate 19, described accurately by Judge Wallace as "a major highway between Nogales and Tucson". I have grave difficulty accepting any comparison of Interstate 19 (at time unknown) with Route 86 between 4:30 and 6:12 a.m. The majority state that the camper, on its round trip on Route 86, during these hours, might have been visiting a small town. Granted. It was possible that this camper was making a round trip to Sells; but it is hardly probable. This conduct, like that in *United States* v. *Kandlis*, 432 F.2d 132, 136 (9th Cir. 1970), was "a very, very suspicious circumstance which justified further inquiry." The test is reasonable, or founded, suspicion. This does not require that the behavior in

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[1] In *Carrizoza-Gaxiola*, this Court affirmed the district court order which granted a motion to suppress, thereby recognizing the district court's particular ability to make findings on credibility. See Judge Enright's concurrence. 523 F.2d at 241-2. Here the majority reverse the district court's order denying a motion to suppress.

question be inconsistent with innocence. *United States* v. *Blackstock*, 432 F.2d 908 (9th Cir. 1970).

The mere fact of a round trip at this time of day, in this location, given the notorious reputation of the area for alien smuggling, was sufficient to support the officers' claim of founded suspicion.

But this information was clearly not the only information that these officers had. They had the further information of Chevron's modus operandi and from that information they had constructed a hypothesis as to his activities on the very night in question. Those pieces of information, even if they would not support founded suspicion when considered individually, surely supported founded suspicion when considered collectively. Each circumstance gained its significance because of its presence with the others; their combined weight added up to founded suspicion. *United States* v. *Avalos-Ochoa*, 557 F.2d 1299 (9th Cir. 1977); *United States* v. *Pulido-Sanoyo*, 580 F.2d 352 (9th Cir. 1978).

United States v. *Brignoni-Ponce*, supra, recognizes the validity of permitting an officer "to assess the facts in light of his experience in detecting illegal entry and smuggling". In this case the officers, on the basis of their experience, put together a series of clues and concluded that there was a strong possibility that Chevron would bring a group of aliens across the border on this night and hour and place, and that he would be met by a vehicle of this sort, traveling in this direction. The clues, as they ana-

lyzed them, were absolutely correct in each detail. I fail to see that suspicion, based on this sort of skillful police analysis, can be called "unfounded" within the test of *Brignoni-Ponce*. I therefore dissent.

/s/ Richard H. Chambers
United States Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed July 19, 1979]

No. 77-1987

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JESUS E. CORTEZ, a/k/a JESUS E. CORTEZ-ESPIONZA,
DEFENDANT-APPELLANT

No. 77-1951

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

PEDRO HERNANDEZ-LOERA, DEFENDANT-APPELLANT

OPINION

Appeal from the United States District Court
for the District of Arizona

Before: CHAMBERS and HUG, Circuit Judges, and
FERGUSON *, District Judge

On June 4, 1979, appellee filed its Petition for Rehearing with Suggestion for Rehearing en banc.

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* Honorable Warren J. Ferguson, United States District Judge for the Central District of California, sitting by designation.

Judges Hug and Ferguson voted to deny the petition for rehearing; Judges Chambers and Hug voted to reject the suggestion for a rehearing en banc; Judge Ferguson recommended the rejection of the suggestion for a rehearing en banc; and Judge Chambers voted to grant a rehearing.

The full court was advised of the suggestion for an en banc rehearing; no judge has requested a vote on this. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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